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NOTE AND COMMENT.

A CRITICISM OF PRESIDENT HADLEY'S VIEWS ON "THE CONSTITUTIONAL POSITION OF PROPERTY IN AMERICA."—

To the Editor of the Michigan Law Review:—

April 16, 1908, there was published in the *Independent* a report of a lecture delivered in Berlin, Prussia, by Arthur T. Hadley, President of Yale University, on "The Constitutional Position of Property in America." On page 878 of the same issue there is an editorial praising very highly President Hadley's views. In the issues of this paper for August 19 and August 26, 1909, there is further commendation of the same kind, pages 392 and 448.

There appear to me errors in this lecture which, considering the great reputation of its author and the place of delivery, ought not to pass unnoticed.

To the doctrine of the lecture that the rights of property are better protected in the United States than elsewhere, because secured by constitutional provisions, whose final interpretation is by the courts, there can be no objection. But this protection does not cover property alone. It covers every fundamental right of individuals. It follows from the fact that we have state and national constitutions, which limit the powers of government, and the rights of legislatures, state and national, to make laws in con-

flict with such constitutions. But the lecture errs in stating the steps by which our constitutional provisions were enacted. It is said: "The delegates to the Convention of 1787 were concerned with questions of constitutional law in the narrower sense. They were not thinking of the legal position of private property. But it so happened that in making mutual limitations upon the powers of the Federal and the State government, they unwittingly incorporated into the Constitution itself certain very extraordinary immunities to the property holders as a body. It was in the first place provided that there should be no taking of private property without due process of law." * * * "This constitutional provision prevented the legislature or executive either of the nation or of the individual states from taking property without judicial inquiry as to the necessity and without making full compensation even in case the result of such inquiry was favorable to the government. No man foresaw the subsequent effect of this provision in preventing a majority of voters acting in the legislature or through the executive from disturbing existing arrangements with regard to railroad building or factory operation until the railroad stockholders or factory owners had had the opportunity to have their case tried in Court."

The federal constitution of 1787 had no provisions protecting private property. The provision on the subject is found in the 5th amendment, adopted by two-thirds of both houses and ratified by three-fourths of the states in 1791, and is as follows: "No person shall * * * be deprived of life, liberty or property without due process of law." This provision applies only to the federal government. It is no restraint on the powers of the states.

So far from giving "extraordinary immunities to property holders," it is old as a principle of civilized government. As stated by CHIEF JUSTICE WAITE in delivering the opinion of the United States Supreme Court in *Munn v. Illinois*, (94 U. S. 113, see 123), "It is found in Magna Charta and in substance, if not in form, in nearly or quite all the constitutions that have been from time to time adopted by the several states of the union. By the Fifth Amendment, it was introduced into the constitution of the United States as a limitation upon the powers of the National Government, and by the Fourteenth, as a guaranty against any encroachment upon an acknowledged right of citizenship by the legislatures of the states."

It is safe to say that the force and effect of this ancient English principle were perfectly understood by those who drafted and adopted the fifth amendment and that they did not act "unwittingly" or inconsiderately. Similar rules are generally enforced in England and perhaps in all civilized states. It may well be questioned whether in any civilized country, the property of railroads or factory owners can be taken by the government without giving them an opportunity for trial in court. President Hadley makes too much of the *Dartmouth College Case* and the fourteenth amendment in seeking to show how the property of corporations is protected. Soon after the decision of the *Dartmouth College Case*, in 1819, the states began to provide against it by constitutional provisions enacting that corporations, save for municipal purposes, should be formed only under general laws which should be subject to alteration, amendment or repeal. It is prob-

ably a great many years since any corporation has been established not subject to this power of the legislature.

The result is that generally corporate franchises are held at the legislative pleasure. Corporate property has no other protection against federal aggression than has individual property. Up to 1868 and the adoption of the fourteenth amendment, there was no federal protection against state aggression upon the rights either of individuals or corporations, except the prohibition against impairing the obligation of contracts.

The fourteenth amendment so far as it affords protection to property but forbids the states to do what they were already forbidden by their constitutions to do and what the federal government was forbidden to do by the fifth amendment. It simply makes the federal court the final arbiter of these old provisions. Nor is it to be supposed that the very able lawyers in Congress who were instrumental in the adoption of the fourteenth amendment were ignorant of its meaning, familiar as they were with similar provisions in Magna Charta and in the federal and state constitutions. And litigation under this provision began soon after it was adopted, and not in 1882, as President Hadley seems to think. In *Davidson v. Miller*, 96 U. S. 97, decided in the October term, 1877, MR. JUSTICE MILLER gave a history of this provision. He further says: But while it has been a part of the constitution as a restraint upon the powers of the states, only a very few years, the docket of this court is crowded with cases in which we are asked to hold that state courts and state legislatures have deprived their own citizens of life, liberty or property without due process of law. President Hadley says: "A corporation therefore under the law of the United States is entitled to the same immunities as any other person and since the charter creating it is a contract whose obligation cannot be impaired by the one sided act of the legislature, its constitutional position as a property holder is much stronger than anywhere in Europe."

This is a great exaggeration. Corporations in the states forming them have now generally no franchises save such as are granted by the state legislatures and may be taken away by the same power. Foreign corporations, those created by other states or nations, have no right to do business in a state, except the conduct of interstate commerce, which that state may not take away. They exist only by sufferance in states other than that in which organized. It is only their property real and personal which is protected by the law. Their franchises are subject to hostile legislation wherever they try to do business.

Again President Hadley says: "The fundamental division of powers in the constitution of the United States is between voters on the one hand and property owners on the other. The forces of democracy on one side divided between the executive and the legislature are set over against the forces of property on the other side with the judiciary as arbiter between them. The constitution itself not only forbidding the legislature and executive to trench upon the rights of property, but compelling the judiciary to define and uphold those rights in a manner provided by the constitution itself."

If anything true is meant by this save that the constitution of the United

States protects rights of property as it does the right to life and liberty, and that the duty of the judiciary is to enforce this protection, I fail to see what it is. I suppose that in every civilized state the laws protect rights in property and the judges enforce these laws. The only difference is that in our constitutions we have statutes not so easily changed as the laws of most nations. There is nothing in the constitution of the United States which is intended to set off property owners as a class by themselves as against others, or which gives them greater or different protection than is accorded to others. It is possible to conceive the owners of property as one class and those who have no property as another, but this is equally true in all nations. But surely, the democracy is not to be conceived as only those who have no property. It is probable that the great majority of the citizens of the United States have some property. Do they therefore not belong to the democracy?

The evil of such statements is that, however intended, they tend to emphasize a division between the rich and the poor not based on fact and hence to stir up feeling among the latter. There are no classes of rich and poor in this country. Those who are today rich may become poor tomorrow, and the poor are often becoming rich. The constitutional provisions protecting rights in property are for the benefit of all, since every man either has or may reasonably expect to have property, and the possessions of a poor man are as dear to him as the greater abundance of the rich.

That the protection of property is one of the governmental functions recognized as important in all civilized states, it is hardly necessary to say. Its recognition in the fifth amendment is in form as well as in substance as old as Magna Charta. Its recognition in the fourteenth amendment does no more than extend to the rights of life, liberty and property, the protection of the federal government against state aggression. The great distinction between this government and that of England in this regard is that here the fundamental rights of the individual to life, liberty and property being guaranteed by written constitutions against deprivation otherwise than by due process of law have the protection of the courts against legislative as well as other encroachment.

Detroit, Oct. 27, 1909.

C. A. KENT.

INCONSISTENT DEFENSES.—The vexed question of the right to rely upon inconsistent defenses is still unsettled. The conflict in the cases continues. *Light v. Stevens* (1908), —Cal. App. —, 103 Pac. 361, and *Postal Telegraph Cable Co. of Texas v. Harriss* (1909), —Tex. Civ. App. —, 121 S. W. 358, assert the right; *Fetzer & Co. v. Williams* (1909), —Kan. —, 103 Pac. 77, denies it. In the California case it was claimed that the contention that certain drafts were intended to apply as payment on account of a promissory note was untenable under the allegation in the pleading that these drafts were received for the use and benefit of a party upon a promise and agreement to return them; in the Texas case that although the plaintiff in his replication stated the facts substantially as set up in the answer in which defendant pleaded a contract alleged to limit its liability to its own line he could claim at the trial that the liability of the defendant was not so limited and that